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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN BENJAMIN WALLACE, JR.
Petitioner

v.

STATE OF ALASKA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

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## I. QUESTIONS PRESENTED FOR REVIEW.

1. When National Guard Troops are used in routine state law enforcement, through the expenditure of federal monies, in direct violation of the Alaska Constitution and Alaska statutes prohibiting their use for that purpose are they deemed federalized so as to violate the posse comitatus act?

2. When National Guard Troops are used to execute the search and seizure of a private citizen's home while armed with loaded weapons in violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the posse comitatus act, does this constitute a violation of the Fourth Amendment to the United States Constitution prohibiting illegal searches and seizures?

3. When National Guard Troops are used to execute the search and seizure of a private citizen's home while armed with loaded weapons in violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the posse comitatus act, does this constitute a violation of the Third Amendment to the United States Constitution prohibiting the quartering of soldiers in time of peace without the consent of the owner of the house and a Fifth and Fourteenth Amendments to the United States Constitution which guarantee citizens of the United States the right to Due Process and Equal Protection?

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Petitioner, John Benjamin Wallace, Jr., respectfully prays a Writ of Certiorari issue to review the judgment and opinion(s) herein of the Supreme Court for the State of Alaska, filed May 5, 1999 (final denial of rehearing on 6/29/99).

## IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgments and Opinions as to which this Petition for Writ of Certiorari seeks review were rendered in an unpublished opinion issued by the Court of Appeals of the State of Alaska, Case No. A-5964 (Appendix at 7). Petitioner filed a Petition for Hearing with the Supreme Court of the State of Alaska on April 16, 1997. The Supreme Court of the State of Alaska granted the Petition for Hearing on August 6, 1997. The Supreme Court for the State of Alaska later issued its order on May 4, 1999, dismissing Petitioner's Petition for Hearing as improvidently granted. (Appendix at 5). The Supreme Court for the State of Alaska issued its Corrected Order on May 5, 1999, dismissing the Petition for Hearing. (Appendix at 3). Petitioner filed a timely Petition for Rehearing before the Supreme Court for the State of Alaska which was denied on June 29, 1999. (Appendix at 1).

## V. GROUNDS FOR JURISDICTION/TIMELINESS OF PETITION FOR WRIT OF CERTIORARI.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1257. The instant Petition for Writ of Certiorari is seeking review by the United States Supreme Court as to the findings issued by the Court of Appeals of the State of Alaska on February 28, 1997. A timely Petition for Hearing to the Supreme Court of the State of Alaska was filed on April 16, 1997 and said Petition was granted on August 6, 1997. The Petition for Hearing was subsequently dismissed as improvidently granted by the Supreme Court of the State of Alaska by Order issued May 4, 1999 and Corrected Order issued May 5, 1999.

Two of the Alaska Supreme Court Justices dissented, and found as follows:

> MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, protem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be sued. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

(Appendix at 4).

A Petition for Rehearing from said dismissal was denied on June 29, 1999, and again, Justices Matthews and Compton dissented. (Appendix at 1-2.)

This Petition for Certiorari is being filed timely by mail within 90 days after the entry of dismissal of Petitioner's Petition for Rehearing to the Supreme Court of the State of Alaska. (Appendix at 1).

## VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Third Amendment of the United States Constitution, the Fourth Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution, the Fourteenth Amendment to the United States Constitution (due process and equal protection), 10 U.S.C. § 375 and 32 U.S.C. § 112.

## VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

The federal constitutional issues were presented at the Alaska Supreme Court, Court of Appeals, and Supreme Court levels.

This petition seeks review of the Court of Appeals for the State of Alaska's unpublished opinion rendered on February 28, 1997. The Superior Court of the State of Alaska denied Mr. Wallace's pre-trial motions raising said issues on January 6, 1995 and Mr. Wallace entered a plea of nolo contendere to Counts II and V of the original indictment preserving the constitutional issues pursuant to Cooksey v. State of Alaska, 524 P.2d 1251 (Alaska 1974). The conviction was affirmed on direct appeal by Court of Appeals of the State of Alaska on February 28, 1997. Mr. Wallace then filed a Petition for Hearing to the Supreme Court for the State of Alaska; initially granted on August 6, 1997, but then dismissed by Order issued on May 4, 1999 and Corrected Order issued on May 5, 1999 as improvidently granted. He then filed a Petition for Rehearing before the Alaska Supreme Court; denied on June 29, 1999. Jurisdiction for the court in the first instance was based upon indictment and/or conviction for alleged violations of the Alaska statutes.

### A. Relevant Facts and Proceedings.

On June 16, 1993, Detective Ronald Robinson of the Anchorage Police Department ("APD") received an anonymous telephone call informing him that there was a marijuana grow operation located at 14201 Specking Road in Anchorage, Alaska. Detective Robinson had no information about the anonymous other than the fact that he believed from her voice that the caller was female. Detective Robinson had no information regarding the basis for the caller's knowledge, if any of Mr. Wallace, his property, or his activities.

On June 17, 1993, Detective Robinson entered onto Mr. Wallace's property through a closed gate despite the fact that "No Soliciting/No Trespassing" signs were posted on the

property. Once he had entered onto the property, the Detective claimed that he smelled growing marijuana and heard fans. Detective Robinson obtained a search warrant for 14201 Specking Road based on the above information and information regarding electrical power usage at the residence.

On June 18, 1993, Detective Robinson executed the search warrant accompanied by other APD officers and members of the National Guard who arrived in a camouflaged military truck, wore military camouflaged uniforms and brandished semi-automatic weapons.

Detective Robinson, who was in charge of the operation, did not determine whether the members of the National Guard unit had any training with respect to how and when to use their weapons. Some of the members of the unit did not even know if their weapons were loaded or not. Others had chambered weapons, with the safety off. They were not clear in their orders or instructions as to if and when they would shoot any of the "fleeing suspects" of a marijuana offense.

The entry into the residence was accomplished through a forced entry in which the back door of the residence was kicked in. The National Guard members participated in the search. A marijuana grow was found and seized. Paperwork was also seized which indicated that property at 6100 Cordova Street in Anchorage, Alaska was being leased by a person named "John Walsh".

On June 19, 1993, Detective Robinson, APD officers and members of the National Guard executed a search warrant at 6100 Cordova Street. On this date, nine members of the national guard assisted the local municipal police in the execution of the search warrant. Again, the national guard arrived in a camouflaged military truck, in black uniforms which said "Police" on the back and "Drug Eradication and Interdiction Unit" on the front, hat, and sleeves. Each national guardsman carried a drawn 9 mm. Beretta semi-automatic weapon. They forced entry, found Mr. Wallace and Mr. Don Beaujean inside. The APD officers and the members of the National Guard unit forced the men at gunpoint to lie on the

floor and the men were handcuffed. The members of the National Guard participated in the search and seizure of evidence from the premises at 6100 Cordova Street.

## VIII. REASONS FOR GRANTING CERTIORARI.

### A. Summary of Argument as to Unauthorized Use of The National Guard.

The rights afforded to citizens under the United States Constitution include the right to be secure in one's home, free from the proverbial "boot at the door", and in particular, "the military boot" (i.e. the forcible invasion of one's home in peace time by armed soldiers). There are sound reasons to insure that the national guard, who are not trained police officers but in essence warriors "trained to shoot and kill" should not be unleashed on the citizens of our country by the government, without the strictest statutory and constitutional controls, and only in true times of a state emergency. The recent teachings of "Waco" and Ruby Ridge" are fresh in our mind, where literally mothers and children were shot by snipers and/or burned alive. The "Kent State Tragedy", although over thirty years distant, remains equally fresh, with the horrors of college students being shot down by inadequately trained national guardsmen, loosed on the populous at a political protest. Although it may be that pursuant to Alaska statutes, the governor of the state of Alaska, has the power to call the national guard into service in actual instances of "war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot" or if people are acting together with intent to commit a felony by force or violence, it is patently dangerous to allow young national guardsmen, with their "finger on the trigger" to aid in serving search warrants for marijuana grow operations in an atmosphere fraught with the potential for a tragedy similar to those previously experienced by the citizens of this country. The carrying of loaded guns by police officers is a fortiori, a highly dangerous activity that calls for precise and detailed training, so that officers cannot and will not mistakenly use their weapons in an emotional and fast moving situation, to shoot citizens, in the

mistaken belief that they are authorized to do so and/or they may be endangered. Delegating this activity to national guardsmen with no police training, is a practice that this Court must halt. Insofar as the governor of Alaska has abdicated his duty, and the Alaska courts have failed to act, this Court must stop these activities. If this practice is not stopped, in all certainty blood will flow and innocent lives will be taken all under the name of the "war on drugs."

B. The Use of The National Guard For Civilian Law Enforcement Activities, Directed at Civilians With no Nexus to The Military, Absent State Law Authorizing Such Use, is a Violation of the Petitioner's Constitutional Rights Under The Third, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and a Violation of 18 U.S.C. § 1385.

The use of the National Guard in this case to assist with the searches and seizures of civilians' homes and businesses and to assist with the apprehension of non-violent, individual civilian suspects was not authorized by the Alaska Constitution, the Alaska statutes or federal law and thus was a violation of Petitioner's federal Constitutional rights. The primary cause for concern raised by this situation is not the fact that federal employees might be borrowed for state service, but rather, that military personnel and equipment might be used against civilians in connection with peace-time police activities in direct violation of the Posse Comitatus Act, 18 U.S.C. § 1385. 18 U.S.C. § 1385 provides the following:

> **§ 1385. Use of the Army and Air Force as posse comitatus**
>
> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(18 U.S.C. § 1385).

In this case, there was no nexus between the subject of the civilian investigation and military personnel or property, and this use of the national guard was therefore prohibited under by the posse comitatus act. Mr. Wallace and his co-defendant were both civilians. Neither Mr. Wallace's home nor the warehouse were on or near a military base. There was no evidence or indication that the marijuana would have been sold to anyone in the military. However, armed members of the Army and Air Force National Guard assisted in the search of Mr. Wallace's personal residence and the seizure of the marijuana therein, and numerous other national guard members, dressed in black DEA jumpsuits and fully armed, assisted in securing the warehouse and conducting the search and seizure of its premises.

The members of the national guard used to conduct the searches and seizures in this case were in federal service for two reasons. The first reason is that they were not authorized under the Alaska Constitution or Alaska statutes to engage in the search and seizure of a private civilian's home or business, and were therefore "federalized" in light of the fact that the national guard was not employed legally in this instance under Alaska's Constitution or statutes. The second reason is that the guard was federally funded under 32 U.S.C. § 112 when they acted in assisting the local police in the execution of a search warrant on a civilian.

32 U.S.C. § 112 is the statute through which a state receives federal funding. 32 U.S.C. § 112 does not provide the authority for use of national guard troops by the states for the purpose of drug interdiction and counter-drug activities. Further, when receiving federal funding for the national guard unit, the national guard cannot be used by a state for this, or any other purpose, when the unit is employed in direct violation of the state's Constitution and its laws.

The use of the national guard in this case was not authorized under Alaska law. Unlike the state of Pennsylvania,

Alaska has not enacted any law permitting use of the national guard in connection with the "War on Drugs." The Alaska legislature has not imbued the Governor of Alaska or his adjutant with the power or authority to call upon the national guard except in times of military-type crisis. Alaska's statute regarding use of the national guard provides in relevant part the following:

> **Governor may order organized militia into active service.** In the event of war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot; or if a mob or body of men act together by force with intent to commit a felony or to offer violence to persons or property, or by force or violence to break and resist the laws of the state, or the United States; or in the case of imminent danger of the occurrence of any of these events; or whenever responsible civil authorities fail to preserve law and order, or protect life and property, or the governor believes that failure is imminent, the governor may order the organized militia or part of it, into active state service to execute the laws and to perform duties in connection with them that the governor considers proper.

(AS § 26.05.070) (emphasis added). By the express language of AS § 26.05.070, there are clear prerequisites to the governor's authority to activate military forces. There must be "war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot," or force or violence by a "mob," a breakdown of law and order, or failure of civilian law enforcement to preserve order, or imminent danger of the occurrence of any of these events, before the governor may activate military forces.[1]

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[1] Note that in the present case, the governor of Alaska did not authorize the use of the national guard for the execution of this

There was no such sense of military urgency in the instant case. Cultivating marijuana in secret in the privacy of one's own home, or in a private warehouse, does not incite riots or the type of violence described in AS § 26.05.070 and in fact, is no more inherently violent than other illegal money-making schemes. Certainly, there was no immediate threat to the core functioning of society such that the civilian authorities could not handle the matter themselves, as they do on a daily basis. At no point in the briefing of this case at the state level did the government argue that civilian law enforcement authorities were incompetent to handle service of the search warrants in the instant case, nor was there ever an allegation or argument made that a breakdown of civilian law enforcement abilities had taken place. The designation of a policy as the "War on Drugs" to rally political support does not make for an actual war; and it is no more legal to use military force to execute this policy than it would have been to use military force to fight Lyndon B. Johnson's "War on Poverty."

Although the Alaska Constitution in Article III, Section 19 does authorize the governor to call forth the military as commander-in-chief, in order to execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion, (Alaska Const., Art. III, § 19) it is clear from the language and the context of the provision that the concern of Article III, § 19 is that the governor be empowered to call upon military personnel when an emergency arises or there is a total breakdown of civil law enforcement abilities, such as is contemplated by AS § 26.05.070.

In conjunction with the fact that the use of the national guard in this case was not authorized by any Alaska Constitutional provision or by Alaska law, the guard was federally funded under 32 U.S.C. § 112 when it acted. This was acknowledged by the Alaska Court of Appeals. (State's

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search warrant at a suspected marijuana grow operation. (State's Brief to Ak Sup. Ct. at 18-20).

Brief - Court of Appeals at 22-23 and Court of Appeals Opinion at 9).

Even if the national guard is not in the service of the United States as they were in this case, the national guard are at all times subject to federal law:

> **26.05.060. Control of Alaska National Guard and Alaska Naval Militia**
>
> The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. 473 - 479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and their members are subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and territories and of the United States.

(AS § 26.05.060).

The national guard's actions without state authority and with federal funding creates a federal use of the national guard, whose actions are reviewable by this Court. Further, this Court has both the duty and the right to review actions on the part of the legislature in violation of the United States Constitution.

1. <u>The Use of The National Guard for Civilian Law Enforcement Activities Violated 18 U.S.C. § 1385</u>.

The posse comitatus act, 18 U.S.C. § 1385, prohibits the willful use of "any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws," except in cases and under circumstances expressly authorized by the United States Constitution or act of congress. The posse comitatus

act was passed in 1878, a product of the Civil War Reconstruction Era, in response to the active employment of federal armed forces by the new republican "carpetbagger" governments of the south to maintain order and stabilize their regimes. See Jackson v. State, 572 P.2d 87, 90 (Alaska 1977). The American tradition of rejecting such use of military force to enforce civilian laws dates back to the Declaration of Independence, which lists as one of the intolerable injustices perpetrated by King George the use of his "lobsterbacks" to enforce civil laws.

18 U.S.C. § 1385 was enacted to prohibit the use of military personnel and equipment against civilians in connection with peace-time police activities. The use in this case of armed military Army and Air Force national guardsmen as a military force to assist in the searches and seizures at Mr. Wallace's home and place of business and to assist in his arrest violated 18 U.S.C. § 1385.

2. The Use of the National Guard For Civilian Law Enforcement Activities Was Not Authorized Under Federal Law.

There is no federal law authorizing the national guard's activities in the instant case. Rather, 10 U.S.C. § 375 expressly prohibits direct participation by United States military personnel in "a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."

Furthermore, 32 U.S.C. § 112 does not provide the necessary federal authority for the use of the national guard in this case. 32 U.S.C. § 112 is merely a funding statute. It permits federal funds to be used to reimburse states for lawful use of the national guard. In United States v. Benish, 5 F.3d 20 (3d. Cir. 1993), the Third Circuit Court of Appeals expressly stated that "32 U.S.C. § 112 addresses only the requirements for federal funding and by its plain language does not govern the legality of the actions of the National Guard." Benish, at 26 (emphasis added). In Benish, the authority for the actions of the national guard was found in the

Pennsylvania statutes, at 71 Pa.Cons.Stat. § 391(e), entitled "Use of Pennsylvania National Guard for Special State Duty," which provides, in relevant part the following:

> (a) The Governor may place, or delegate authority to the Adjutant General to order, any volunteer member of the Pennsylvania National Guard or, when unavailable due to call or order into the service of the United States, any member of the Pennsylvania Guard, on special State duty to . . . support Federal , State and local drug eradication and interdiction operations and perform other necessary military duties to the extent that funds are appropriated and available for special State duty.

71 Pa.Cons.Stat. § 391(e)(a) (emphasis added). The other subsections of Pa.Cons.Stat. § 391(e) set forth reporting requirements and conditions for use of the national guard in this manner. The Pennsylvania statute is precisely the kind of state statute necessary to authorize the national guard to act in accordance with the role the federal government anticipated that it might be used for in enacting 32 U.S.C. § 112. There is no comparable Alaska statute. This, there is no federal authority justifying use of the military in the instant circumstances. (See also, United States v. Kyllo, 809 F.Supp. 787 (D. Or. 1992) in which a national guard technician was used to operate a thermal imaging device but was providing specialized technical assistance and was removed from circumstances in which he was likely to encounter civilians, as opposed to acting as an auxiliary local law enforcement officer).

3. The Appropriate Remedy is Exclusion.

Alaska Supreme Court Justice Rabinowitz issued an opinion in Kim v. State, 817 P.2d 467 (Alaska 1991) in which he and Justice Compton dissent from the Alaska Supreme Court's denial of the petition for rehearing to the Alaska Supreme Court in the case of Moon v. State, 785 P.2d 45 (Alaska App. 1990). Justice Rabinowitz argued that the appropriate remedy for a violation of 18 U.S.C. § 1385 is exclusion, stating:

> This court, of course, is without authority to enforce the penal terms of a federal act. Nevertheless, an apparent violation of the Act is not without potential remedy in a state court proceeding. That remedy is the exclusion of illegally obtained evidence.

Moon, at 471 (emphasis added). The particular use of the national guard in Moon was identical to the present case. Justice Rabinowitz stated:

> [W]here the sole targets of the investigation are civilian; where the investigation takes place entirely off any military base or installation; where the Army serves at the behest and admitted mere convenience of civil authorities; and where no military function less general than the health and efficiency of Army personnel is advanced to justify direct military participation, no exception to the Posse Comitatus Act is appropriate, and the exclusionary rule should apply "to remove incentives for governmental intrusions into protected areas," Alaska R. Evid. Commentary at 364, if not also "to breathe life" into the federal constitutional guarantees which underlie the Act, and the state constitutional guarantees which protect Alaskans from unreasonable searches and seizures. Id. at 472.

In State v. Pattioay, 896 P.2d 911, 922-923 (Haw. 1995), the Supreme Court of Hawaii excluded evidence on the basis of a violation of 18 U.S.C. § 1385 even though it found that the defendant did not have a personal, constitutionally-derived right to be "free from military involvement in the investigation of civilian criminal activity," and even though there was no evidence in the record of a pattern of violations of the posse comitatus act. The court's decision to exclude was based upon its "supervisory responsibility to ensure that tainted evidence is not utilized in criminal proceedings," id. at 925, analogizing to the "silver platter" doctrine of Elkins v. United States, 364 U.S. 206, 208 & n.2 (1960). The court held:

> Permitting only the statutory remedy expressly contemplated under the PCA would obviate the court's necessary role in supervising state criminal prosecutions and would also amount to judicial sanction of federal law violations by federal military personnel. Id. at 926.

State courts have also found exclusion to be the appropriate remedy where the violations of 18 U.S.C. § 1385 are excessive. See Taylor v. State, 645 P.2d 522, 525 (Okla. Cr. App. 1982) ("Even more offensive is [the military police officer's] active participation in the search of the appellant's house after the arrest").

In the instant case, there is also evidence of significant participation by the national guard, including searching Mr. Wallace's personal residence (Tr. 249); and of repeated and ongoing violations of the posse comitatus act. See, Harker v. State, 663 P.2d 932, 934 (Alaska 1983).

Both the national guardsmen and the Anchorage police officers involved in the searches and seizures of Mr. Wallace's residence and place of business and in securing the premises to deter or prevent his escape testified during the hearing before the Alaska trial court that the actions of the national guardsmen reflected a policy that is put into practice on a daily basis. The two guardsmen who assisted the Anchorage Police Department in searching Mr. Wallace's

residence testified that they were assigned that duty as their 40-hour a week job. One guardsman testified to having been on perhaps as many as 50 similar raids. Major Kean, the guard unit's commanding officer, testified that the program under which the Guard was operating in this case regularly employs between 25 and 80 national guardsmen. Thus, exclusion in this case is necessary both to promote judicial fairness and integrity, and to deter continuing blatant abuses of military power in violation of 18 U.S.C. § 1385.

C. The Use of National Guard Troops to Execute the Search and Seizure of a Private Citizen's Home While Armed with Loaded Weapons was in Violation of the Alaska Constitution, Article III, Section 19 and in violation of Alaska Statute 26.05.070, and/or in violation of 18 U.S.C. § 1385, the Posse Comitatus Act, and This Constituted a Violation of the Fourth Amendment to the United States Constitution Prohibiting Illegal Searches and Seizures.

The use of the armed national guard unit to execute a search warrant for a suspected marijuana grow in a situation in which there was no prior indication that any suspect would be armed or in any way violent, put all possible occupants of the premises to be searched in unreasonable danger. This use of the national guard constituted an impermissible and unreasonable search and seizure in violation of the protections provided by the Fourth Amendment to the United States Constitution.

The use of the national guard in this case raises numerous issues beyond considerations of proper authority. The testimony of the guard members at the hearing before the Alaska trial court indicated that their training is minimal, and the danger they pose is extreme. The Kent State tragedy occurred because members of the national guard fired at a crowd under circumstances that were not life-threatening, but perceived to be so by guardsmen who were insufficiently trained to properly and safely react to the situation.

In the instant case, armed members of the national guard were stationed around a warehouse where two suspects were located. If a suspect had attempted to flee through a side door and accidentally bumped into a guard member, that guard member might have shot in "self-defense." The guard members were not properly trained in the execution of a warrant in civilian law enforcement nor were they even given adequate instructions as to when they could use their weapons prior to the raid. Several of the guard members did not even realize their weapons were loaded. Finally, there is no indication that the national guard members were given any training with respect to civilian suspects' rights under the Fourth Amendment to the United States Constitution.

It is inherently dangerous to allow national guardsmen trained to engage in military activity, but with no training in police activity in a time of peace to assist local law enforcement in the service of warrants on peaceful civilians. The national guard unit in this case used loaded weapons with no specific training to ensure that they would not intentionally and/or accidentally or negligently kill private citizens in the "heat of the moment." The referenced tragedies of "Waco," "Ruby Ridge" and "Kent State" are unquestionable proof that students, children, mothers, and citizens, can be gunned down in their homes, unless the use of deadly force by law enforcement officers is only exercised with utmost care and training. The extra-ordinary use of the national guard, (i.e., part-time soldiers trained to shoot and kill with no police training) by the governor of the State of Alaska, and in this case, without the governor's approval, should be restricted to actual insurrection or other clear and present danger to the public that civilian law enforcement cannot manage as specifically required by Alaska's statutes.

Since the governor of Alaska has not acted to so restrict the use of the national guard, and has not made the specific findings necessary to use same, and has not assumed the responsibility for making such a claim, it now falls clearly upon this Court to halt this practice as it constitutes a violation of federal law and of the rights of the citizens of the state of Alaska under the United States Constitution. The alternative is

an inevitable and certain killing or maiming of citizens, by the armed troops in their homes, investigating the growing of marijuana, which in Alaska, is legal to possess. The Alaska Supreme Court held in Raven v. State, 537 P.2d 494 (Alaska 1975) that an Alaskan's possession of marijuana is constitutionally protected as to such use in the home under the specific provisions of the Alaska Constitutional right to privacy. The use of a military force to execute a warrant on a civilian, particularly in a situation in which there is no evidence that the suspects will present a danger to law enforcement and the activity itself is not inherently dangerous, constitutes an unreasonable search and seizure in violation of the protections guaranteed by the Fourth Amendment to the United States Constitution.

1. The Manner in Which the Search Warrant was Served in This Case was Violative of the Fourth Amendment to the United States Constitution.

The manner in which the search warrant was executed in this case was per se constitutionally deficient and violative of Mr. Wallace's rights to be free from unreasonable search and seizure under the Fourth Amendment of the United States Constitution in that nine members of the national guard, armed with loaded semi-automatic weapons, provided active support for local municipal law enforcement officers who served the warrant, terrorizing the occupants of 6100 Cordova, including Mr. Wallace, and assisted in the ensuing search and seizures without adequate justification or authority.

The manner in which a warrant is served must be reasonable in order to comport with Fourth Amendment guarantees that citizens will be free from unlawful searches and seizures. Generally, this issue arises in the context of "knock and announce" cases. (See United States v. Bustamante-Gomez, 488 F.2d 4, 9 (9th Cir. 1973) cert. denied, 416 U.S. 970 (1974)). When a warrant is served in an unconstitutionally unreasonable manner, the fruits of that search must be suppressed in order to deter further similar violations by the police.

The warrants obtained in this case for Mr. Wallace's residence were to be served by "Any Peace Officer." The warrants are not directed to "Any Peace Officer and Whomever He Wishes to Bring Along." There must be some authority supporting the use of armed members of the Army and Air Force National Guard to assist in securing the sites to be searched and in seizing the items discovered in this case for the manner of service to be considered reasonable. As argued supra, no such authority exists in this case. Thus, the fruits of the unconstitutionally served warrant must be suppressed.

The violations surrounding service of the warrant at 6100 Cordova Street were even more egregious, as Mr. Wallace and another person were inside the warehouse at the time and were suddenly confronted by the presence of fourteen "law enforcement officers" dressed in a manner similar to SWAT team members, bearing loaded semi-automatic weapons, who surrounded the warehouse broke down the door, used their weapons to force the men to the floor, and hand-cuffed their hands behind their backs. Counsel would hazard a guess that such a situation would cause more fear and concern to the average citizen than the more typical technical violation of the knock and announce rule.

D. National Guard Troops Used to Execute the Search and Seizure of a Private Citizen's Home While Armed With Loaded Weapons in Violation of the Alaska Constitution, Article III, Section 19 and in Violation of Alaska Statute 26.05.070, and/or in Violation of 18 U.S.C. § 1385, the Posse Comitatus Act, Constitutes a Violation of the Third Amendment to the United States Constitution Prohibiting the Quartering of Soldiers in a Time of Peace and Constitutes a Violation of the Fifth and Fourteenth Amendments to the United States Constitution Which Guarantee Citizens of the United States the Right to Due Process and Equal Protection.

The citizens of Alaska are entitled to protection under the United States Constitution, in particular, the Bill of Rights. The Alaska legislature's power to enact statutes is limited by the United States Constitution, in the present case, to the extent that Alaskan citizens are not required to entertain soldiers or allow them into their homes at all during times of peace or during times of war unless in a manner prescribed by law.

The use of the national guard to execute a search warrant on civilians in their private home and business constituted a violation of the guarantees of the United States Constitution to Due Process and Equal Protection of the Laws.

Encouraging the active participation of military reserve personnel in civilian law enforcement activities is dangerous and misguided public policy. It was quite apparent from the hearing testimony of the eight or nine national guard members involved in this incident that they had not been properly trained to act as civilian police officer. These men were in DEA uniforms positioned around a building in which civilian suspects were present, and in which civilians might have tried to escape through back doors or windows, whether as a result of guilt, fear or confusion. The guard members all carried weapons, which some guard members thought were loaded and others thought were not loaded. Still others admitted in their testimony that they had no idea whether the weapons they carried were loaded or not. Their recollections to when they would be permitted to use self-defense was spotty and

inconsistent (and in fact shockingly dangerous and fraught with the potential for a mistaken killing or maiming of a suspect or by-stander) and did not reflect an understanding of the law of self-defense.

Following extensive research on the subject, one author noted that the primary concern with the use of military for civilian purposes is due to the military members' training. "Because of their unique weaponry and training, military forces have a greater potential to cause casualties than normally equipped police forces." Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations, 26 Loyola L.A. Law Rev. 1291, 1313 (1993).

The use of the military in civilian law enforcement presents an unacceptable and unconstitutional increased risk of danger to private citizens due to the fact that military personnel are trained for combat against other military forces. They are not trained for investigation and/or apprehension of non-violent civilians. The use of the military in this capacity is in direct violation of federal law and the United States Constitution and must be curtailed, if not by the state courts, then by this Court, as it is a clear violation of the 18 U.S.C. § 1385 and the United States Constitution.

In the case of Laird v. Tatum, 408 U.S. 1 (1972), this Court granted certiorari to consider whether, as the Court of Appeals held, respondents presented a justiciable controversy in complaining of a 'chilling' effect on the exercise of their First Amendment rights where such effect is allegedly caused, not by any specific action of the Army against them, but only by the existence and operation of the intelligence gathering and distributing system, which is confined to the Army and related civilian investigative agencies.

The Respondents brought a class action in the United States District Court seeking declaratory and injunctive relief on their claim that their rights were being invaded by the Department of the Army's alleged surveillance of lawful and peaceful civilian political activity. The petitioners described the

activity as the gathering by lawful means, and maintaining and using in their intelligence activities, information relating to potential or actual civil disturbances or street demonstrations.

This Court favorably quoted the Court of Appeals observations regarding the national guard's need for adequate information prior to being enlisted to assist local law enforcement agencies. In Laird, this Court approved the Army's non-intrusive compilation of information on private citizens who were thought to have potential for civil disorder as a measure if the armed forces were called into duty pursuant to 10 U.S.C. § 331. The logic of this Court in Laird holds completely true in the present case:

> [When called upon to assist local authorities] the Army is essentially a police force or the back-up of a local police force. To quell disturbances or to prevent further disturbances the Army needs the same tools and, most importantly, the same information to which local police forces have access. Since the Army is sent into territory almost invariably unfamiliar to most soldiers and their commanders, their need for information is likely to be greater than that of the hometown policeman.
>
> 'No logical argument can be made for compelling the military to use blind force. When force is employed [408 U.S. 6] it should be intelligently directed, and this depends upon having reliable information--in time. As Chief Justice John Marshall said of Washington, 'A general must be governed by his intelligence and must regulate his measures by his information. It is his duty to obtain correct information; . . ..' So we take it as undeniable that the military, i.e., the Army, need a certain amount of information in order to perform their constitutional and statutory missions.

(Laird, at 2322).

The national guard in this case was used against a private citizen without any training or information regarding civil law enforcement and procedure. No attempt was made by the local law enforcement prior to the execution of the warrant to ensure that the guardsmen would not fire on the suspects. The lack of information that the guardsmen had is shockingly evident in that, as previously noted, some of the guardsmen did not know if the weapons they were carrying were loaded.

This Court reversed the Court of Appeals decision and determined that the jurisdiction of a federal court may not be invoked by a complainant who alleges that his constitutional rights have been violated (in the Laird case, through a chilling of the exercise of rights pursuant to the First Amendment) by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

In the present case, the military was enlisted in a capacity which was intrusive to a degree far beyond that of an innocuous body gathering public information on civilians. The use of the guard, in every sense, against its citizens is an activity that is so intrusive as to be constitutionally invalid.

## IX. SUMMARY AND CONCLUSION.

The "war on drugs" cannot be converted into "war on citizens" using armed troops "locked and loaded" and ready to shoot on a moment's notice in the face of real and/or imagined danger. The designation of a policy as the "War on Drugs" to rally political support does not make for an actual war; and it is no more legal to use military force to execute this policy than it would have been to use military force to fight Lyndon B. Johnson's "War on Poverty." The privilege of law enforcement officers to use deadly force, must be severally and carefully curtailed, and only exercised with the utmost

discretion and training. The use of national guardsmen such as evidenced in this case is literally a "tragedy waiting to happen." Petitioner earnestly urges this Court to prevent such a tragedy so that Anchorage, Alaska, Kenai, Alaska, or other peaceful communities in Alaska, will not attain the notoriety and historical shame of "Waco," "Ruby Ridge," and "Kent State."

The Court should grant Certiorari and reverse.

Respectfully submitted this 27th day of September, 1999.

Phillip Paul Weidner
Counsel for Petitioner

Supreme Court, U.S.
FILED
99 567 SEP 27 1999
Office Of the Clerk

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN BENJAMIN WALLACE, JR.
Petitioner

v.

STATE OF ALASKA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioner

By: Phillip Paul Weidner 9/27/99
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In the Supreme Court of the State of Alaska

| | | |
|---|---|---|
| **John Benjamin Wallace, Jr.** | ) | Supreme Court No. **S-08084** |
| Petitioner, | ) | |
| v. | ) | |
| | ) | **Order** |
| **State of Alaska,** | ) | Petition for Hearing |
| Respondent. | ) | Date of Order: **6/29/99** |

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Carpeneti, Justices, and Compton, Senior Justice, Pro Tem* [Bryner, Justice not participating].

**It is Ordered:**

The Petition for Rehearing is **Denied**.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/

Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, Pro Tem, joins, dissenting. They would grant the petition.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Rowland
Trial Court Appeals Clerk - Anchorage

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Weidner & Associates APC
330 L Street #200
Anchorage AK 99501

William H Hawley Jr.
OSPA
310 K Street #308
Anchorage AK 99501

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*Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

**In the Supreme Court of the State of Alaska**

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|---|---|---|
| **John Benjamin Wallace, Jr.** | ) | Supreme Court No. **S-08084** |
| Petitioner, | ) | |
| v. | ) | **Corrected Order** |
| **State of Alaska,** | ) | Petition for Hearing |
| Respondent. | ) | Date of Order: **5/5/99** |

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Carpeneti Justices, and Compton, Senior Justice, pro tem* [Bryner, Justice not participating].

**It is Ordered:**

The Petition for Hearing, filed on 4/16/97, and granted on 8/6/97, is **Dismissed** as improvidently granted.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/
Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, pro tem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be used. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Rowland
Trial Court Appeals Clerk - Anchorage

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*Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

**In the Supreme Court of the State of Alaska**

| | | |
|---|---|---|
| **John Benjamin Wallace, Jr.** | ) | Supreme Court No. **S-08084** |
| Petitioner, | ) | |
| v. | ) | |
| | ) | **Order** |
| **State of Alaska,** | ) | Petition for Hearing |
| | ) | |
| Respondent. | ) | Date of Order: **5/4/99** |
| | ) | |

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Bryner, Justices, and Compton, Senior Justice, pro tem* [Carpeneti, Justice, not participating].

**It is Ordered:**

The Petition for Hearing, filed on 4/16/97, and granted on 8/6/97, is **Dismissed** as improvidently granted.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/

Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, pro tem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be used. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

cc: Supreme Court Justices
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*Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

Notice: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE COURT OF APPEALS OF THE STATE OF ALASKA

| | | |
|---|---|---|
| JOHN BENJAMIN WALLACE, JR., | ) | Court of Appeals No. A-5964 |
| Appellant, | ) | Trial Court No. 3AN-S93-7066CR |
| vs. | ) | |
| | ) | O P I N I O N |
| STATE OF ALASKA, | ) | |
| Appellee, | ) | [No. 1514 – February 28, 1997] |

Appeal from the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, Judge.

Appearances: Phillip Paul Weidner and Nicole D. Stucki, Weidner & Associates, Inc., Anchorage, for Appellant. W.H. Hawley, Prosecutions and Appeals, Anchorage, and Bruce M.. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Mannheimer, Judges.

COATS, Judge.

On June 16, 1993, Detective Ronald Robinson of the Anchorage Police Department (APD) received an anonymous telephone call informing him that there was a marijuana growing operation located at 14201 Specking Road, "possibly in the upstairs and basement areas." The caller told Robinson "you can smell the marijuana outside of the building and you can hear fans running inside the building." Robinson said the caller had a "female voice" and spoke in a lucid manner. Robinson did not know the basis of the call for information.

Robinson then telephoned a Chugach Electric Association (CEA) employee and requested information

concerning the electric usage at 14201 Specking Road. Robinson did not obtain a search warrant or a subpoena for this information. Robinson was informed that the dwelling at this address was a duplex and that John Benjamin Wallace, Jr. was being billed for power consumption at both apartments. Robinson was told that the average monthly consumption was 3092 kilowatt-hours (kwh) for one apartment and 2557 kwh for the other. Robinson stated he knew from prior investigations that the average CEA customer uses 700 kwh of power per month.

On June 17, 1993, Robinson drove to 14201 Specking Road, accompanied by APD Detective Patrick O'Brian. O'Brian stayed in the car while Robinson walked up the driveway of the residence. Robinson said that as he approached the residence he smelled the "fresh pungent odor of growing marijuana." He also heard fans running inside the residence. Robinson then passed through a gate, went up to the porch and rang the door bell. A man came to the door whom Robinson recognized from a drivers license photo as John Benjamin Wallace, Jr. Robinson asked Wallace if a

fictitious person lived there and Wallace said he did not. Robinson asked if the residence was a duplex and Wallace responded it was not. Robinson stated in his affidavit for a search warrant that the smell of marijuana was stronger at the open door than in the driveway. When Robinson returned to the police car, O'Brian said he could smell marijuana on Robinson's clothing.

On June 18, 1993, Robinson submitted an affidavit and applied for a search warrant based on the information above. The magistrate issued a search warrant for the residence located at 14201 Specking Road.

On the evening of June 18, 1993, Robinson, Accompanied by four other APD officers and two members of the Alaska National Guard, went to the Specking residence to serve the warrant. No one was home and the officers forced entry through the back door. A marijuana growing operation was discovered in the basement. The members of the National Guard assisted in the search of the

basement and in dismantling the growing operation. Robinson found photographs of what appeared to be a different marijuana grow set up in a similar manner to the Specking Road grow just discovered. Paperwork was found upstairs, including a lease of a warehouse at 6100 Cordova Street to "John Walsh . . . doing business as John Walsh & Associates," a power bill for the location, and a hand diagram of the warehouse indicating a "Lab 'A'" and "Lab 'B.'"

Robinson and four other APD officers went to the warehouse at 6100 Cordova Street. While standing in the dirt road leading to the parking lot of the warehouse, all five officers said they could smell the "fresh pungent odor of growing marijuana" and could hear what sounded like powerful fans inside the building. Based upon this information, on June 19, 1993, Robinson obtained a search warrant for the warehouse. Robinson, accompanied by four other APD officers and nine members of the National Guard,

went to 6100 Cordova Street to serve the second search warrant. The police forced entry after there was no response to their knocking. The police found John B. Wallace, Jr. and Don Beaujean harvesting marijuana from a marijuana growing operation. Members of the National Guard stood around the perimeter of the warehouse when the police entered. The Guardsmen entered the warehouse after it was secured, dismantled the growing operation, and transported the marijuana and equipment to storage.

On September 15, 1993, an information was filed charging Wallace with six counts of fourth-degree misconduct involving a controlled substance. Wallace filed several pretrial motions, including a motion to suppress the evidence seized at his residence and at the warehouse. On January 6, 1995, Judge Mark C. Rowland denied these motions.

On January 9, 1995, Wallace entered nolo contendere pleas on two of the counts; the other four counts were

dismissed. Wallace preserved the issues he has raised in this appeal under Cooksey v. State, 524 P.2d 1251 (Alaska 1974).

On appeal, Wallace first contends that the Anchorage Police Department's use of the National Guard soldiers to execute the search warrants violated the Posse Comitatus Act and that the appropriate remedy is exclusion of the evidence discovered in the searches.

18 U.S.C. § 1385 (1988) (amended 1994), known as the Posse Comitatus Act, states:

> Whoever, except in cases and under circumstances expressly authorized by the constitution of Act Congress, willfully uses any part of the Army or the Air Force as a possecomitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The critical inquiry which must be answered is whether or not the Alaska National Guard constitutes " any part of the Army or the Air Force." 10 U.S.C. § 3062 (c) (1) (1994) States:

> The Army consists of-
>
> the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve[.]

(Emphasis added. ) Likewise, 10 U.S.C. § 8062 (d) (1) (1994) states:

> The Air Force consists of-
>
> The Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve[.]

(Emphasis added.)[1] As stated above, when the Guardsman participated in the search of Wallace's home and the Cordova Street warehouse, they were acting as members of the Alaska National Guard and were not in the service of the United States ( also known as being "federalized"). Therefore, the Guardsman were not "part of the Army of the Air Force." Under the plain language of the statute, the

participation of the National Guard soldiers in serving the search warrant did not violate the Posse Comitatus Act.

Both the Third Circuit and a federal district court in Oregon have concluded that use of National Guard soldiers to enforce state criminal drug laws does not violate the Posse Comitatus Act. In United States v. Bensish, 5 F.3d 20, 25-26 (3d Cir. 1993), the Pennsylvania State Police used a squad from the Pennsylvania Army National Guard to assist them in the surveillance and investigation of a marijuana growing operation. The court concluded that the Posse Comitatus Act was not violated, because the Guard unit was not in federal service. In United States v. Kylla, 809 F.Supp. 787 (D.Or. 1992), overruled on other grounds, 37 F.3d 526 (9th Cir. 1994), a member of the Oregon National Guard operated a thermal imaging device in investigating a drug operation. The court Ruled that the Posse Comitatus Act was not violated, noting that: "[t]he Supreme Court has recognized

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[1] Members of the Alaska National Guard can be members of

the dual nature of a National Guard and the fact that National Guardsmen only lose their status as a member of the state National Guard when they are 'drafted into federal service by the President.'" Id. At 793 (citing Perpich v. Department of Defense, 496 U.S. 334, 344 (1990)) .[2]

---

either the Army National Guard or the Air National Guard.

[2] Wallace focuses on the "military purpose" exception to the Posse Comitatus Act and argues that the use of the National Guard in the instant case does not fit within the exception. This argument is irrelevant. It is true that military personnel can search suspects and seize evidence, notwithstanding the language of the Posse Comitatus Act, if an independent military personnel can the Posse Comitatus Act, if an independent military purpose justifies the military involvement. uses on the "military purpose" exception to the Posse Comitatus Act and argues that the use of the National Guard in the instant case does not fit within the exception. This argument is irrelevant. It is true that military personnel can search suspects and seize evidence, notwithstanding the language of the Posse Comitatus Act, if an independent military personnel can the Posse Comitatus Act, if an independent military purpose justifies the military involvement. See Harker v. State, 663 P.2d 932 (Alaska 1983). Wallace correctly asserts that no independent

Both the plain language of the Posse Comitatus Act and case law interpreting the Act support the conclusion that the state's use of National Guard soldiers to execute the search warrants did not violate the Posse Comitatus Act. We accordingly conclude that Judge Rowland did not err in finding that the state did not violate the Posse Comitatus Act in this case.

Wallace next contends that state statutes did not authorize the use of National Guard soldiers to execute the search warrants. However, the Alaska Constitution provides that "[t]he governor is commander-in-chief of the armed forces of the State. He may call out these forces to execute the laws, suppress of prevent insurrection or lawless violence, or repel invasion." Alaska Const., art. 3, § 19. Therefore, under the constitutional language, the governor is

---

purpose justified the use of the National Guard to search Wallace's house and the warehouse. Nevertheless, no violation of the Posse Comitatus Act occurred because the Guardsmen were not federalized when they acted.

authorized to use National Guard soldiers to execute the laws. The statutes regulating the National Guard are set out in Chapter 5 of Title 26 of the Alaska Statutes. The parties have not cited any provision in that chapter that would prohibit the use of National Guard soldiers in this case.

Wallace argues that "[t]here is no federal law authorizing the National Guard's activities in the instant case."

Wallace cites 10 U.S.C. § 375 (1994), which prohibits the "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." However, as we have previously discussed, the members of the Army National Guard who participated in the two searches were not members of the "Army, Navy, Air Force, or Marine Corps" because they were under the command of the Alaska National Guard and were not "in the service of the United

States." Furthermore, 32 U.S.C. § 109 (1994) states that "[n]othing in this title limits the right of a state . . . to use its National Guard . . . within its borders in time of peace." Also, 32 U.S.C. § 112 (d) (1994) states:

> Nothing in this section shall be construed as a limitation on the authority of a unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned.

Because federal law does not prohibit the use of the Alaska National Guard, and because the Guard was under the control of the State of Alaska's chain of command, the only restraint on the use of the Guard would be state law. As we have previously pointed out, state law does not appear to limit the governor's power to use the National Guard "to execute the laws."

Wallace next contends that the state did not show that the governor actually authorized the use of the National Guard soldiers to execute the search warrants in this case.

He contends that Judge Rowland improperly limited his ability to argue this issue by examining documents in camera and not turning them over to the defense.

In Braham v. State, 571 P .2d 631, 643 (Alaska 1977), cert. denied, 436 U.S. 910 (1978), the Supreme Court of Alaska stated the following concerning the duty of the prosecution to disclose confidential material to the defense:

> Non-disclosure was proper only if (1) the prosecution showed that discovery of the evidence would be inconsistent with protection of persons or enforcement of the laws and (2) the trial judge concluded that the material was not relevant to the defense. If the district attorney failed to show that disclosure would harm enforcement or protection efforts, the materials must be disclosed. The question of relevance would then be decided in an adversary context; both counsel would have the opportunity to make their respective arguments.
>
> Disclosure is also required if the judge's in camera inspection showed that the material was relevant to the defense-whether or not the prosecutor had demonstrated that discovery would be inconsistent with enforcement or protection efforts. In the

> latter circumstance, the state must decide between continuing to prosecute, while incurring the problems posed by disclosure, and terminating the prosecution in order to maintain the material's secrecy.

(Footnotes omitted.)

In the instant case Wallace requested disclosure of the Alaska National Guard Counterdrug plan. We have reviewed the materials which Judge Rowland reviewed in camera. We conclude that Judge Rowland did not err in refusing to require the prosecution to disclose to the defense the Alaska National Guard Counterdrug Plan. Judge Rowland could properly find that "discovery of the evidence would be inconsistent with protection of persons or enforcement of the laws" and "that the material was not relevant to the defense." The plan itself provides no insight into whether or not the governor of Alaska had authorized use of the National Guard for law enforcement purposes.

We believe that the record in this case sufficiently establishes that the use of National Guard soldiers to aid the police in executing the search warrant was properly

authorized. A letter in the record from the statewide narcotics unit chief written on behalf of the attorney general, certified that the unit chief had reviewed the National Guard Counterdrug Plan for the fiscal year ending September 30, 1993, and concluded that "all operations and activities for the federal funding under the plan are consistent with and not prohibited by state law." We do not believe that the state was required to show that the governor had specifically authorized the use of the National Guard in each individual case. We rely on State v. Wheelor, 903 P.2d 399 (Or. App. 1995). In that case the court stated:

> Defendants also argue that the execution of the warrant was unconstitutional, because the Guard participated in it without direct, formal, written authorization from the Governor. The state argues that the use of the Guard was properly authorized. The trial court found that, although the Governor had not authorized the use of the Guard in this particular case, she had ordered the Guard to cooperate with the Yamhill County Interagency Narcotics Team. The trial court further found that, in this case, the Guard participated under the direct supervision of

> the state police. Defendant does not challenge those findings. The question, therefore, is whether the governor's more general authorization suffices.

Id. At 405. Relying on the Oregon statutes, the court concluded that there was "no express requirement for the issuance of a formal, written order for each action the Guard is directed to take." Id. Similarly, was we have previously pointed out, the Alaska Constitution gives the governor broad authority to use the National Guard "to execute the laws." Alaska Const., art. 3, § 19. There is no requirement in the statutes regulating the National Guard (AS 26.05) which would require the governor to issue a formal written order for every individual action of the Guard.

Courts are entitled to rely on the presumption of regularity which attaches to the acts of public officials. The supreme court set out this presumption in Wright v. State, 501 P.2d 1360, 1372 (Alaska 1972), where the court quoted from Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960):

> Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.

This court and the supreme court have adhered to this principle in subsequent cases. See Tallman v. Dept. of Public Works, 506 P.2d 679, 681 (Alaska 1973) (where the losing party in a civil trial challenged the array of the jury panel, the supreme court stated, "[u]nless a challenging party makes some showing of a miscarriage of the official duty, we shall presume that duty has been regularly performed") (footnote omitted); Finkelstein v. Stout, 774 P.2d 786, 790 (Alaska 1989) (presumption of regularity was rebutted concerning the casting of absentee ballots); Jerrel v. State, 851 P.2d 1365, 1372 (Alaska App. 1993), cert. denied, 510 U.S. 1100 (1994) ("The presumption of regularity attaches to this situation, requiring this court to presume, in the absence of a contrary showing, that the trial court acted in accordance with its ruling[.]"); Houston-Hult v. State, 843 P.2d 1262,

1266-67 (Alaska App. 1992) (finding state established chain of evidence sufficiently, relying on presumption of regularity).

Employing the presumption of regularity, we conclude that Judge Rowland did not err in concluding that the use of the National Guard troops in this case was pursuant to lawful orders. We further conclude that Judge Rowland did not err in denying Wallace's motion to suppress on the ground that the use of these troops had not been properly authorized under state law.

Wallace next contends that there was in sufficient evidence to support the issuance of the warrants to search Wallace's house and warehouse. However, the information which the police presented to the magistrate in support of the warrant to search Wallace's house is very similar to the information which we recently found was sufficient in McClelland v. State, ___ P.2d___, Op. No. 1503 (Alaska App., Dec. 6, 1996). In McClelland, we followed "the vast

majority of cases [which] support the conclusion that either the smell of growing marijuana or the odor of burning marijuana will support the issuance of a search warrant." Id. At 5.

In the instant case, in his affidavit in support of the search warrant, Detective Robinson set out his extensive background in drug enforcement, including participation "in serving [thirty-two] search warrants involving indoor marijuana grow operations." He stated that "[b]ased on this experience I have come to be able to distinguish the fresh, pungent odor of growing or freshly harvested or processed marijuana." He then stated that he smelled the "fresh pungent odor of growing marijuana' as he approached Wallace's residence and the smell of marijuana was stronger at the open door of the residence. According to Detective Robinson, when he returned to the car after talking with Wallace, his partner, Detective Pat O'Brien, "who had not gotten out of the vehicle said he could smell marijuana o n

[Robinson's] clothing." From this testimony, the magistrate could properly determine that both officers were familiar with the odor of growing marijuana, could identify that odor, and smelled the odor coming from Wallace's residence. See McClelland at 6. Additionally, in his affidavit Robinson also supported his conclusion that Wallace had a marijuana growing operation at this house with evidence of Wallace's high electrical usage and the information from the anonymous telephone call. Although the anonymous tip and Wallace's electrical consumption are insufficient by themselves to establish probable cause, this information does corroborate the most significant information supporting the search warrant - the fact that the officers smelled growing marijuana at Wallace's residence. We conclude that the information which detective Robinson presented to the magistrate was sufficient for the magistrate to issue the search warrant. See McClelland, at 6-7.

Wallace next raises several arguments concerning the search of the warehouse. He first contends that the seizure of the documents and photographs at Wallace's house, which led the police to the warehouse, was not authorized by the warrant. Judge Rowland found that "the documents seized were within the ambit of the mandate contained in the warrant and related to legitimate purposes of the warrant in the Specking Street address." Judge Rowland's ruling is not clearly erroneous. The warrant authorized an extensive search for drugs and drug-related materials, and it appears that the photographs and documents which led the police to the warehouse were authorized by the warrant.

Wallace next contends that the search warrant for the warehouse was invalid because Robinson made misrepresentations in his affidavit in support of the search warrant. Robinson stated in his affidavit that paperwork found at Wallace's house "indicated" that Wallace leased and paid the electricity bills for the Cordova Street

warehouse. In fact, Wallace elicited from Robinson that none of the paperwork regarding the Cordova Street warehouse actually had Wallace's name on it. Robinson apparently concluded that Wallace was associated with the warehouse because the paperwork was found in the name of "J.B. Walsh" or "John Walsh," and Wallace's name is John B. Wallace, Jr. Robinson's affidavit could have led the magistrate to believe that Wallace's name was actually on the lease for the warehouse and its utility bills.

The Alaska Supreme Court in State v. Malkin, 722 P.2d 943 (Alaska 1986), held that misstatements in affidavits must be excised and the remainder of the affidavit tested for probable cause if (1) the defendant specifically points out the statements in the affidavit that are false, and (2) the state does not show by a preponderance of the evidence that the statements were not made intentionally or with reckless disregard for the truth. Id. At 946.

Robinson testified how he reached his conclusion that Wallace leased the warehouse and paid the utility bills. This testimony was sufficient for Judge Rowland to conclude that Robinson did not make intentional or reckless misstatements in order to obtain the search warrant. Also, Judge Rowland found that the search warrants were supported by sufficient evidence. Even if the information connecting Wallace with the warehouse was more specifically explained, the magistrate would have likely issued the warrant anyway. This is because the warrant was based almost entirely on the other information which the police found at the Specking Road house which led them to the warehouse, and upon the fact that the first officers smelled growing marijuana at the warehouse. Therefore, Judge Rowland did not err in failing to suppress the second search warrant based upon the statements Detective Robinson presented to the magistrate.

Wallace contends that the state presented insufficient evidence to the magistrate to support the issuance of the

second search warrant. However, as we indicated in our previous discussion, the materials which the police seized at Wallace's Specking Road house, coupled with their investigation of the warehouse (particularly the odor of marijuana emanating from the warehouse), supported the issuance of the search warrant.

Wallace next reasons that since the search warrants in question empowered "any peace officer" to serve the warrants, the search warrants did not authorize the police to allow the National Guard soldiers to assist them in serving the search warrant because the soldiers were not peace officers. When confronted with this argument, Judge Rowland pointed out that a police officer can call upon any citizen for assistance. Judge Rowland's observation is supported by AS 12.35.040, which provides that an officer executing a warrant has the power and authority "to call any other person to the officer's aid." We accordingly conclude that Judge Rowland did not err in rejecting this argument.

Wallace asserts that Detective Robinson violated his rights to privacy and freedom from unreasonable searches and seizures when he went through a gate in Wallace's fence, walked up the driveway to the front porch, and rang the doorbell. Wallace argues that this constituted a warrantless search of the curtilage surrounding his home and leading to the discovery of the odor of marijuana when Wallace opened his door. On this issue, Professor Wayne R. LaFave cites Lorenzana v. Superior Court, 511 P.2d 33 (Cal. 1973) for the principle that "[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there." 1 Wayne R. LaFave, Search and Seizure, § 2.3 (c) at 482-83 (3d ed. 1996). LaFave continues by citing other cases:

> [C]ourts have held "that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public," and that in so doing they

> "are free to keep their eyes open and use their other senses." This means, therefore, that if police utilize "normal means of access to and egress from the house" for some legitimate purpose, such as to make inquiries of the occupant ...it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.

Id. At 483-84 (footnotes omitted).

The Alaska Supreme Court has adopted this rationale. In Pistro v. State, 590 P .2d 884 (Alaska 1979), an Alaska State Trooper, with information that stolen truck parts may be in defendant Pistro's garage, drove in to his driveway. As he walked up to the side door of the garage to talk to two men he saw inside, he observed through the garage window an engine hanging on a block and tackle. Pistro was ultimately convicted of larceny and concealing stolen property. On appeal, Pistro argued that the trooper, by moving up the driveway, was trespassing and searching without a warrant. The court stated:

> Police officers walking through an unfenced driveway to inquire at premises have been held not to invade any reasonable expectation of privacy. The driveway was a normal means of ingress and egress impliedly open to public use by one desiring to speak to occupants of the garage, or to park off the street while visiting occupants of the house. This is not a case of an officer leaving such a means of public access to spy from an area not impliedly open to the public. There was no invasion of rights to privacy, and [the trooper] could constitutionally observe what was in plain view in the garage.

Pistro, 590 P.2d at 887 (footnote omitted).

According to Judge Rowland's findings, Detective Robinson, like the trooper in Pistro, approached Wallace's residence via the drive way, a normal means of ingress and egress. Accordingly, Judge Rowland did not err in rejecting Wallace's argument.

Wallace contends that Detective Robinson acted illegally and without a proper purpose, by approaching his residence and asking Wallace if a fictitious person lived

there. However, courts have routinely allowed police to employ non-coercive trickery in the course of investigations, and in serving search warrants. See State v. Weller, 884 P.2d 610, 612 (Wash. App. 1994) (detective knocked on defendant's door and pretended to be looking for table saw; court held the officer may lawfully enter porch and smell marijuana without violating the resident's right to privacy); United States v. Leung, 929 F. 2d 1204, 1208 (7th Cir.) cert. denied, 502 U.S. 906 (1991) (police investigating heroin sale properly used ruse which caused defendant to open door to hotel room); Lockwood v. State, 591 P.2d 969, 972 (Alaska 1979) (officers serving search warrant used ruse which caused defendant to open door; entry upheld because officers substantially complied with knock and announce requirements).

Detective Robinson was not required to be completely candid with Wallace by informing him that he was investigating whether Wallace was harboring a

marijuana growing operation. Under the law, the police have leeway to conceal the purpose of their investigation to avoid alerting suspects to the fact that they are being investigated. Requiring Detective Robinson to be more candid with Wallace might very well have alerted Wallace to the fact that he was being investigated, and resulted in the destruction of evidence. There is simply no such legal requirement.

Wallace next cites McGahan v. State, 807 P.2d 506, 509-11 (Alaska App. 1991), in which this court held that reasonable suspicion was required before the government could conduct a search with a trained dog to detect drugs. Wallace contends that we should impose a similar requirement on police officers, and require a police officer to have reasonable suspicion before he can approach a residence to detect drugs using his sense of smell. In discussing this issue, Professor LaFave states:

> [T]here is no "reasonable expectation of privacy" from lawfully positioned agents "with inquisitive nostrils." This means, for example, that no search in a Fourth

> Amendment sense has occurred when a law enforcement officer, lawfully present at a certain place, detects odors emanating from private premises, from a vehicle, or from some personal effects nearby.

1 LaFave, supra, at 403 (footnotes omitted). We agree with Professor LaFave's analysis and conclude that Judge Rowland did not err in denying Wallace's motion to suppress on this ground.

Wallace asserts that his rights of privacy and freedom from unreasonable search and seizure were violated by the police when they obtained his electrical usage records without a warrant. Wallace acknowledged that at the time he submitted his brief, Alaska courts had not yet ruled on this issue. Subsequently, this court addressed this issue in Samson v. State, 919 P.2d 171 (Alaska App. 1996). This court ruled that "utility records are maintained by the utility and do not constitute information in which society is prepared to recognize a reasonable expectation of privacy." Id. At 173. We adhere to our decision in Samson, and

conclude that Wallace had no reasonable expectation of privacy in his utility records.

The conviction is AFFIRMED.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

**Constitutional Provisions:**

**First Amendment, United States Constitution. Freedom of religion, of speech, and of the press.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Third Amendment, United States Constitution. Quartering of soldiers.** No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Fourth Amendment. Searches and seizures.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Fourteenth Amendment. Citizenship rights not to be abridged by states.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Article III, Section 19, Alaska Constitution. Military Authority.** The governor is commander-in-chief of the armed forces of the State. He may call out these forces to

execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the Sate, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers.

**FEDERAL STATUTES:**

**10 U.S.C. § 375. Restriction on direct participation by military personnel**

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

**18 U.S.C. § 1385. Use of Army and Air Force as posse comitatus**

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

**28 U.S.C. § 1257. State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

**32 U.S.C. § 112. Drug interdiction and counter-drug activities**

(a) Funding assistance.--The Secretary of Defense may provide funds to the Governor of a State who submits to the Secretary a State drug interdiction and counter-drug activities plan satisfying the requirements of subsection (c). Such funds shall be used for the following:

(1) The pay, allowances, clothing, subsistence, gratuities, travel, and related expenses, as authorized by State law, of personnel of the National Guard of that State used, while not in Federal service, for the purpose of drug interdiction and counter-drug activities.

(2) The operation and maintenance of the equipment and facilities of the National Guard of that State used for the purpose of drug interdiction and counter-drug activities.

(3) The procurement of services and equipment, and the leasing of equipment, for the National Guard of that State used for the purpose of drug interdiction and counter-drug activities. However, the use of such funds for the procurement of equipment may not exceed $5,000 per purchase order, unless approval for procurement of equipment in excess of that amount is granted in advance by the Secretary of Defense.

(b) Use of personnel performing full-time National Guard duty.--(1) Under regulations prescribed by the Secretary of Defense, personnel of the National Guard of a

State may, in accordance with the State drug interdiction and counter-drug activities plan referred to in subsection (c), be ordered to perform full-time National Guard duty under section 502(f) of this title for the purpose of carrying out drug interdiction and counter-drug activities.

(2)(A) A member of the National Guard serving on full-time National Guard duty under orders authorized under paragraph (1) shall participate in the training required under section 502(a) of this title in addition to the duty performed for the purpose authorized under that paragraph. The pay, allowances, and other benefits of the member while participating in the training shall be the same as those to which the member is entitled while performing duty for the purpose of carrying out drug interdiction and counter-drug activities. The member is not entitled to additional pay, allowances, or other benefits for participation in training required under section 502(a)(1) of this title.

(B) Appropriations available for the Department of Defense for drug interdiction and counter-drug activities may be used for paying costs associated with a member's participation in training described in subparagraph (A). The appropriation shall be reimbursed in full, out of appropriations available for paying those costs, for the amounts paid. Appropriations available for paying those costs shall be available for making the reimbursements.

(C) To ensure that the use of units and personnel of the National Guard of a State pursuant to a State drug

interdiction and counter-drug activities plan does not degrade the training and readiness of such units and personnel, the following requirements shall apply in determining the drug interdiction and counter-drug activities that units and personnel of the National Guard of a State may perform:

(i) The performance of the activities may not adversely affect the quality of that training or otherwise interfere with the ability of a member or unit of the National Guard to perform the military functions of the member or unit.

(ii) National Guard personnel will not degrade their military skills as a result of performing the activities.

(iii) The performance of the activities will not result in a significant increase in the cost of training.

(iv) In the case of drug interdiction and counter-drug activities performed by a unit organized to serve as a unit, the activities will support valid unit training requirements.

(3) A unit or member of the National Guard of a State may be used, pursuant to a State drug interdiction and counter-drug activities plan approved by the Secretary of Defense under this section, to provide services or other assistance (other than air transportation) to an organization eligible to receive services under section 508 of this title if--

(A) the State drug interdiction and counter-drug activities plan specifically recognizes the organization as being eligible to receive the services or assistance;

(B) in the case of services, the performance of the services meets the requirements of paragraphs (1) and (2) of subsection (a) of section 508 of this title; and

(C) the services or assistance is authorized under subsection (b) or (c) of such section or in the State drug interdiction and counter-drug activities plan.

(c) Plan requirements.--A State drug interdiction and counter-drug activities plan shall--

(1) specify how personnel of the National Guard of that State are to be used in drug interdiction and counter-drug activities;

(2) certify that those operations are to be conducted at a time when the personnel involved are not in Federal service;

(3) certify that participation by National Guard personnel in those operations is service in addition to training required under section 502 of this title;

(4) certify that any engineer-type activities (as defined by the Secretary of Defense) under the plan will be performed only by units and members of the National Guard;

(5) include a certification by the Attorney General of the State (or, in the case of a State with no position of Attorney General, a civilian official of the State equivalent to a State attorney general) that the use of the National Guard of the State for the activities proposed under the plan is authorized by, and is consistent with, State law; and

(6) certify that the Governor of the State or a civilian law enforcement official of the State designated by the Governor has determined that any activities included in the plan that are carried out in conjunction with Federal law enforcement agencies serve a State law enforcement purpose.

(d) Examination of plan.--(1) Before funds are provided to the Governor of a State under this section and before members of the National Guard of that State are ordered to full-time National Guard duty as authorized in subsection (b), the Secretary of Defense shall examine the adequacy of the plan submitted by the Governor under subsection (c). The plan as approved by the Secretary may provide for the use of personnel and equipment of the National Guard of that State to assist the Immigration and Naturalization Service in the transportation of aliens who have violated a Federal or State law prohibiting or regulating the possession, use, or distribution of a controlled substance.

(2) Except as provided in paragraph (3), the Secretary shall carry out paragraph (1) in consultation with the Director of National Drug Control Policy.

(3) Paragraph (2) shall not apply if--

(A) the Governor of a State submits a plan under subsection (c) that is substantially the same as a plan submitted for that State for a previous fiscal year; and

(B) pursuant to the plan submitted for a previous fiscal year, funds were provided to the State in accordance with subsection (a) or personnel of the National Guard of the

State were ordered to perform full-time National Guard duty in accordance with subsection (b).

(e) Exclusion from end-strength computation.--Members of the National Guard on active duty or full-time National Guard duty for the purposes of administering (or during fiscal year 1993 otherwise implementing) this section shall not be counted toward the annual end strength authorized for reserves on active duty in support of the reserve components of the armed forces or toward the strengths authorized in sections 12011 and 12012 of title 10.

(f) End strength limitation.--(1) Except as provided in paragraph (2), at the end of a fiscal year there may not be more than 4000 members of the National Guard--

(A) on full-time National Guard duty under section 502(f) of this title to perform drug interdiction or counter-drug activities pursuant to an order to duty for a period of more than 180 days; or

(B) on duty under State authority to perform drug interdiction or counter-drug activities pursuant to an order to duty for a period of more than 180 days with State pay and allowances being reimbursed with funds provided under subsection (a)(1).

(2) The Secretary of Defense may increase the end strength authorized under paragraph (1) by not more than 20 percent for any fiscal year if the Secretary determines that such an increase is necessary in the national security interests of the United States.

(g) Annual report.--The Secretary of Defense shall submit to Congress an annual report regarding assistance provided and activities carried out under this section during the preceding fiscal year. The report shall include the following:

(1) The number of members of the National Guard excluded under subsection (e) from the computation of end strengths.

(2) A description of the drug interdiction and counter-drug activities conducted under State drug interdiction and counter-drug activities plans referred to in subsection (c) with funds provided under this section.

(3) An accounting of the amount of funds provided to each State.

(4) A description of the effect on military training and readiness of using units and personnel of the National Guard to perform activities under the State drug interdiction and counter-drug activities plans.

(h) Statutory construction.--Nothing in this section shall be construed as a limitation on the authority of any unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned.

(i) Definitions.--For purposes of this section:

(1) The term "drug interdiction and counter-drug activities", with respect to the National Guard of a State,

means the use of National Guard personnel in drug interdiction and counter-drug law enforcement activities, including drug demand reduction activities, authorized by the law of the State and requested by the Governor of the State.

(2) The term "Governor of a State" means, in the case of the District of Columbia, the Commanding General of the National Guard of the District of Columbia.

(3) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

**ALASKA STATUTES:**

**§ 26.05.060. Control of Alaska National Guard and Alaska Naval Militia**

The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. 473 - 479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and their members are

subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and territories and of the United States.

**§26.05.070. Governor may order organized militia into active service**

In the event of war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot; or if a mob or body of men act together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of the state, or the United States; or in the case of imminent danger of the occurrence of any of these events; or whenever responsible civil authorities fail to preserve law and order, or protect life and property, or the governor believes that failure is imminent, the governor may order the organized militia or any part of it, into active state service to execute the laws and to perform duties in connection with them that the governor considers proper. Whenever any portion of the militia is ordered into active service by the governor, it becomes an additional police force, retaining its separate entity and operating at all times as a military organization under military command, with power to cooperate with but not to supersede the existing civilian law enforcement officers whenever possible, for the re-establishment of law and order

and for the protection of life and property. The governor may also order members of the organized militia to active state service, with their consent, for the purpose of training or for full-time duty with the office of the adjutant general.